

Docket: 2019-2832(IT)I

BETWEEN:

EVA ENTERPRISES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 9, 2021, at Toronto, Ontario

Before: The Honourable Justice David E. Spiro

Appearances:

Agent for the Appellant: Miroslaw Chmielewska
Counsel for the Respondent: Kevin Hong

JUDGMENT

The appeals of the assessments made under the *Income Tax Act* for the Appellant's 2012, 2013 and 2017 taxation years are dismissed, without costs.

Signed at Toronto, Ontario, this 6th day of January 2022.

“David E. Spiro”

Spiro J.

Citation: 2022 TCC 1
Date: 20220106
Docket: 2019-2832(IT)I

BETWEEN:

EVA ENTERPRISES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Spiro J.

[1] Mr. Mirosław Chmielewska drives a transport truck for the Appellant, Eva Enterprises Inc. (the “corporation”). During the three taxation years at issue, he was the corporation’s only employee. Mr. Chmielewska and his wife are the corporation’s shareholders and directors. The corporation uses its truck to transport produce including meat, vegetables, and other goods across the Canada-United States border.

[2] The corporation has appealed assessments of tax and late-filing penalties made by the Minister of National Revenue (the “Minister”) under the *Income Tax Act* (the “Act”) for each of its 2012, 2013, and 2017 taxation years.

[3] The assessments of tax were made under subsection 152(7) of the Act. That provision allows the Minister to make an “arbitrary assessment” of tax payable for a taxation year regardless of the contents of a return or whether a return has been filed at all:

152(7) The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.

[4] In order to succeed in its appeals against the assessments of tax under subsection 152(7) of the Act, the corporation must disprove, on a balance of probabilities, the assumptions of fact underlying the Minister's assessments for each of the corporation's 2012, 2013, and 2017 taxation years.

[5] The Respondent's Reply to the Notice of Appeal (the "Reply") describes each assessment of tax, and the assessment of late-filing penalties, at issue in these appeals:

5. By way of the Assessments, the Minister:

a. assessed taxable income as follows:

	2012 Taxation Year	2013 Taxation Year	2017 Taxation Year
Gross business income	\$71,376	\$133,198	\$119,880
Business expenses	21,413	39,960	35,964
Payroll expenses	<u>27,534</u>	<u>35,003</u>	<u>30,052</u>
Taxable Income	<u>\$22,439</u>	<u>\$ 58,235</u>	<u>\$ 53,864</u>

b. assessed federal taxes of \$3,442, \$8,734, and \$8,080 for the 2012, 2013 and 2017 taxation years, respectively;

c. assessed repeated failure to file penalties of \$3,010 and \$7,715 for the 2012 and 2013 taxation years, respectively, pursuant to subsection 162(2) of the *Act*; and

d. assessed failure to file return of income penalty of \$1,141 for the 2017 taxation year, pursuant to subsection 162(1) of the *Act*.

[6] The only witness called by the corporation was Mr. Chmielewska. Counsel for the Respondent introduced evidence by way of affidavit sworn by an officer of the Canada Revenue Agency (the "CRA").

Tax Assessments for 2012, 2013, and 2017

[7] Mr. Chmielewska testified that he kept the corporation's financial and tax data for 2012 and 2013 on QuickTax software on a laptop computer. He kept the laptop computer in the truck.

[8] In July of 2018, Mr. Chmielewska was involved in a serious crash while driving the truck in the United States. He spent one day in a hospital followed by months of recuperation. He said that he was unable to retrieve anything from the truck following the crash.¹

[9] I accept that the truck was totaled as a result of the crash.² I also accept that the laptop was in the truck at the time of the crash. However, I do not accept that Mr. Chmielewska could not have retrieved the laptop from the truck following the crash. There is no evidence that he attempted to do so himself or that he asked the towing company, the police, or anyone else to do so on his behalf.

[10] Even if he was unable to retrieve the laptop after the crash, the data stored in the QuickTax program could have been retained in the cloud and may, therefore, have been recoverable. Yet there is no evidence that Mr. Chmielewska asked QuickTax to attempt to recover that data.

[11] Compounding the problem of the missing data, the corporation had a rather casual approach to financial record-keeping. This is reflected in Mr. Chmielewska's answer to a question in cross-examination about recording reimbursements made to him by the corporation:

Q: When you paid with your own credit card, were you reimbursed by Eva Enterprises?

A: Yes, of course, yes.

Q: Do you have anything that shows the transfer of money from Eva to you for the reimbursement?

A: No, because this is family business.³

¹ Transcript, page 23, lines 4-7.

² Two photographs of the truck at Exhibit A-3 show the aftermath of the crash.

³ Transcript, page 49, lines 12-17.

[12] This does not give the Court any confidence in the reliability of the corporation's financial records. The corporation did not have an accountant. Nor did it have a bookkeeper. Mr. Chmielewska kept the corporate receipts and invoices at his home in Toronto. Yet Mr. Chmielewska chose not to bring any of those receipts or invoices to the hearing. He acknowledged having received the Notice of Hearing which includes the following in bold letters:⁴

PLEASE NOTE that all relevant documents in support of the appeal must be available at the hearing of the appeal.⁵

[13] During cross-examination, he explained that he did not bring the receipts or invoices with him as they were in "big boxes".⁶

[14] It was in this context that Mr. Chmielewska offered to the Court a one-page summary of revenue and operating expenses for each of the corporation's 2012 and 2013 taxation years (Exhibits A-1 and A-2). He said that he assembled each summary using the corporation's receipts and invoices. He did not offer the Court a summary for the corporation's 2017 taxation year as he said that he had already sent it to the CRA.⁷

[15] For the following reasons, I have serious reservations about the reliability of those summaries and would, therefore, assign them little weight.

[16] First, fuel costs were listed at exactly \$15,000 and hotel and food costs at exactly \$2,000 on the 2012 summary. Those amounts appear to have been rounded up or down. It is unlikely that they reflect the total of actual invoices or receipts. It is more likely that they are simply estimates. But there is no way of knowing without reviewing the source documents themselves.

[17] Second, if the receipts and invoices were at his home why would Mr. Chmielewska not bring them to the hearing? He said that he did not do so

⁴ Transcript, page 64, lines 5-22.

⁵ The Notice of Hearing also states: "If more than one period of assessment is involved, read these appeals for this appeal or the appeal throughout".

⁶ Transcript, page 44, lines 10-12.

⁷ Transcript, page 52, lines 2-19. As I mentioned to Mr. Chmielewski at the start of the hearing, the Tax Court of Canada is completely independent and has no connection to the Minister or to the CRA (Transcript, page 4, line 27 to page 5, line 6).

because they were in “big boxes”.⁸ But those boxes would only have contained the financial records for three years of operation of a transport business with one truck and one driver. What was the difficulty in bringing them to court? That question remains unanswered.

[18] Subsection 230(1) of the Act requires every person carrying on business to keep records so that tax payable for each taxation year may be determined:

230(1) Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person’s place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.⁹

[19] I draw the inference that such records do not exist or, if they do exist, that they would not have supported the corporation’s case.

[20] As to the amounts at issue, the Minister determined the corporation’s income as:

- (a) \$22,439 for 2012;
- (b) \$58,235 for 2013; and
- (c) \$53,864 for 2017.¹⁰

[21] As noted in paragraph 5(a) of the Reply, the Minister computed income for those years under subsection 152(7) of the Act by taking:

⁸ Transcript, page 44, lines 10-12. This point was reiterated during the corporation’s argument. See the transcript, page 95, line 27 to page 96, line 4.

⁹ Subsection 248(1) of the Act provides the meaning of the word “record” which:

includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form;

¹⁰ Paragraph 12(k) of the Reply. See also paragraphs 12(e) through 12(j) of the Reply.

- (a) gross income as reported on the corporation's GST return for the calendar year closest to the particular taxation year;¹¹
- (b) deducting 30% as an estimate of reasonable expenses;¹² and
- (c) deducting salary as reported on the corporation's payroll records.¹³

[22] The corporation's 2012 summary reflects additional expenses of \$11,269 which the Minister did not deduct in computing income for that year.¹⁴ The corporation's 2013 summary reflects additional expenses of \$27,435 which the Minister did not deduct in computing income for that year.¹⁵ Unfortunately, the corporation failed to adduce any reliable evidence to support its position that those additional expenses should be allowed.

[23] The Minister's approach to computing income under subsection 152(7) of the Act was reasonable in the circumstances. In light of the complete absence of source documents, and serious concerns about the reliability of the summaries, the corporation has not disproved, on a balance of probabilities, the assumptions of fact underlying the Minister's assessment of tax for each of the corporation's 2012, 2013, and 2017 taxation years.

Penalty Assessments for 2012, 2013, and 2017

[24] As the taxation year of the corporation ends on October 7 of each year, the tax returns for the corporation's 2012, 2013, and 2017 taxation years were due:

- (a) on April 8, 2013, for its 2012 taxation year;

¹¹ Mr. Chmielewska agreed that the gross income figures taken by the Minister from the corporation's GST returns were correct. See the transcript, page 8, line 13 to page 9, line 18.

¹² Mr. Chmielewska did not agree with the Minister's estimate of expenses which he maintained were too low. See the transcript, page 10, line 21 to page 12, line 5 and page 15, lines 10-21.

¹³ Mr. Chmielewska agreed that the payroll amounts were correct. See the transcript, page 14, lines 9-17.

¹⁴ The Minister allowed expenses of \$48,947 in computing income for the 2012 taxation year (paragraph 5(a) of the Reply). The corporation's summary states that its expenses were \$60,216 for that year.

¹⁵ The Minister allowed total expenses of \$74,963 in computing income for the 2013 taxation year (paragraph 5(a) of the Reply). The corporation's summary states that its expenses were \$102,398 for that year.

(b) on April 8, 2014, for its 2013 taxation year; and

(c) on April 9, 2018, for its 2017 taxation year.¹⁶

[25] At the opening of trial, I reviewed each of the Minister's assumptions of fact with Mr. Chmielewska. One of those assumptions is that the corporation "did not file its income tax returns for any of the 2012, 2013 and 2017 taxation years as of August 28, 2018". That was the date of the assessments at issue.¹⁷

[26] Although he disagreed with that assumption,¹⁸ Mr. Chmielewska admitted "[t]hat was the problem because I cannot prove that I filed the taxes."¹⁹

[27] He testified that the CRA wrote to the corporation in May of 2018 asking it to file returns for the 2012, 2013 and 2017 taxation years and that the CRA wrote once again to the corporation in June of 2018 asking it to file those returns.²⁰ Both letters preceded the date of the crash.

¹⁶ Reply, paragraph 12(c).

¹⁷ Reply, paragraph 12(d). A portion of the affidavit introduced by the Respondent (Exhibit R-1) is inconsistent with that assumption. The affidavit states that the corporation filed returns for its 2012, 2013, and 2017 taxation years on July 30, 2018 (paragraphs 12(b) and (c) and paragraph 14). Mr. Chmielewska denied having filed any returns on that date. I find his evidence on this point credible, particularly as he was then recovering from injuries suffered in the crash earlier that month. I assign no weight to that portion of the affidavit because there was "proof to the contrary" within the meaning of subsection 244(8) of the Act:

244(8) Where, by this Act or a regulation, a person is required to make a return, statement, answer or certificate, an affidavit of an officer of the Canada Revenue Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has charge of the appropriate records and that after careful examination of those records the officer has found that the return, statement, answer or certificate was filed or made on a particular day, shall, in the absence of proof to the contrary, be received as evidence that it was filed or made on that day and not prior thereto.

[Emphasis added]

¹⁸ Transcript, page 8, lines 1-8.

¹⁹ Transcript, page 7, lines 6-11.

²⁰ Transcript, page 56, line 26 to page 58, line 12. The letter of June 2018 is also mentioned at paragraph 11 of the affidavit introduced by the Respondent (Exhibit R-1).

(a) Repeated Failure to File Penalties for 2012 and 2013

[28] In paragraph 13 of the Reply, the Respondent alleges the following facts in respect of the repeated failure to file penalties assessed for each of the corporation's 2012 and 2013 taxation years:

13. In imposing repeated failure to file penalties for each of the 2012 and 2013 taxation years pursuant to subsection 162(2) of the *Act*, the Minister relied on the following additional facts:
 - a. the Appellant did not file its income tax returns for the 2012 and 2013 taxation years by April 8, 2013 and April 8, 2014, respectively;
 - b. on or about June 25, 2018, the Minister sent a demand for a return in respect of the 2012 and 2013 taxation years; and
 - c. the Appellant was subject to failure to file return of income penalty of \$142 for the 2010 taxation year pursuant to subsection 162(1) of the *Act*.

[29] The uncontradicted portions of the affidavit introduced by the Respondent establish each of the factual elements of the repeated failure to file penalties as required by subsection 162(2) of the *Act*:

162(2) Every person [is liable to a penalty]

- (a) who fails to file a return of income for a taxation year as and when required by subsection 150(1),
- (b) to whom a demand for a return for the year has been sent under subsection 150(2), and
- (c) by whom, before the time of failure, a penalty was payable under this subsection or subsection 162(1) in respect of a return of income for any of the 3 preceding taxation years

[30] Mr. Chmielewska testified that he could not recall when he filed the corporation's 2012 return "because it was a long time ago."²¹ He could not remember whether he filed the corporation's 2012 and 2013 returns on time.²² He could not say exactly when the corporation filed its returns of income for the 2012 and 2013 taxation years.²³

[31] But he later testified that he must have filed the corporation's income tax returns on time because he would have filed them at the same time as he filed the corporation's GST returns, namely, in January or February of the following calendar year.²⁴ During argument, his story changed yet again when he said that the corporation had filed those returns "maybe a year late".²⁵

[32] In any event, Mr. Chmielewska did not produce confirmation of the transmission of electronic copies of those returns nor did he produce hard copies of those returns. He did not produce the notice of assessment that would have been issued by the Minister following the filing of each of those returns.

[33] After weighing the uncontradicted portions of the Respondent's affidavit evidence against the vague, shifting, and contradictory evidence given by Mr. Chmielewska, I conclude that the Respondent has proved, on a balance of probabilities, the facts underlying the Minister's assessment of repeated failure to file penalties for the corporation's 2012 and 2013 taxation years under subsection 162(2) of the Act.

(b) Late Filing Penalty for 2017

[34] The Minister assumed that the corporation had not filed a return of income for its 2017 taxation year by its due date on April 9, 2018.²⁶ The Minister also assumed that the corporation had not filed a return of income for that year by August 28, 2018, the date of the assessment.²⁷

²¹ Transcript, page 23, line 26 to page 24, line 5.

²² Transcript, page 27, lines 4-10 and page 31, lines 21-24.

²³ Transcript, page 59, lines 17-20.

²⁴ Transcript, page 66, line 17 to page 68, line 2.

²⁵ Transcript, page 95, lines 11-17.

²⁶ Paragraph 14 of the Reply suggests that the 2017 return was due on April 8, 2018, but that date was a Sunday. At paragraph 12(c) of the Reply, the Minister correctly assumed that the due date was April 9, 2018.

²⁷ Paragraph 12(d) of the Reply.

[35] Mr. Chmielewska did not dispute the Minister's assumption that the corporation's 2017 return had been filed late.²⁸ In argument, he conceded that it was not filed on time.²⁹ The corporation adduced no evidence to disprove the Minister's assumption that it had not filed a return of income for its 2017 taxation year by August 28, 2018, the date of the assessment.

Conclusion

[36] The corporation's evidence falls far short of demonstrating that the Minister's assessments of tax or penalty were incorrect. The appeals are, therefore, dismissed without costs.

Signed at Toronto, Ontario, this 6th day of January 2022.

“David E. Spiro”

Spiro J.

²⁸ Transcript, page 27, lines 11-14.

²⁹ Transcript, page 96, lines 22-24.

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COURT FILE NO.: 2019-2832(IT)I
STYLE OF CAUSE: EVA ENTERPRISES INC. AND HER MAJESTY THE QUEEN
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: December 9, 2021
REASONS FOR JUDGMENT BY: The Honourable Justice David E. Spiro
DATE OF JUDGMENT: January 6, 2022

APPEARANCES:

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Counsel for the Respondent: Kevin Hong

COUNSEL OF RECORD:

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